89-1780

No.

Supreme Court, U.S.
FILED
MAY 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1989

ROBERT DeBONIS,

Petitioner,

against

RICHARD CORBISIERO, as Chairman and JOSEPH NEGLIA, as a Member of the New York State Racing & Wagering Board, Division of Thoroughbred Racing and the New York State Racing & Wagering Board,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner deprived of his Fifth Amendment privilege against self-incrimination, by use of an inference against by reason of his failure to testify, in a quasi-criminal State administrative proceeding, where his license to train thoroughbred horses and, therefore, his livelihood, was at stake?

2. Was petitioner deprived of his Sixth Amendment right to confrontation with the witnesses and the right to cross examine, where a deposition was used against him in a quasi-criminal State administrative proceeding, which deposition was used to support an inference that he had filed a false instrument, concerning the pedigree of horses trained by him?

3. Was petitioner deprived of his Fourteenth Amendment right to a fair and impartial hearing, where the hearing officer, who presided over the proceeding, was the administrative officer who drafted the regulations, which petitioner was charged with violating?

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IN THE
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ROBERT DeBONIS,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT

OFFICIAL AND UNOFFICIAL OPINIONS

On the 16th day of May, 1988, Hearing Officer John M. Dailey of the New York State Racing & Wagering Board made a report of hearing officer, a copy of which is annexed in the appendix, finding petitioner guilty of attempted fraud in the registration of four foals (thoroughbred horses). On the 18th-day of May, 1988, the New York State Racing and Wagering Board adopted the report of the hearing officer and revoked the trainer's license of petitioner, a copy of which is annexed. On the 16th day of December, 1989, the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department affirmed the determination of the New York State Racing & Wagering Board and dismissed the petition for review,

sub nom. *In re DeBonis v. Corbisiero,*__ A.D.2nd __ , __ N.Y.S.2d (2nd Dept., 1989), a copy of which is annexed. On the 26th day of April, 1989, the New York Court of Appeals denied petitioner leave to further appeal, which was served upon petitioner by mail, with notice of entry dated May 2nd, 1990, a copy of which is annexed.

JURISDICTION

Jurisdiction to review the determination is claimed under 28 U.S.C. 1257.

CONSTITUTIONAL AMENDMENTS

The Fifth, Sixth and Fourteenth Amendments to the Constitution are implicated in the petition for Certiorari.

STATEMENT OF THE CASE

Sections 244-249 of the New York State Racing & Wagering Board creates a program that gives owners and breeders of thoroughbred horses substantial financial incentives to produce "New York bred" horses, which program is administered by the New York Thoroughbred Breeding and development Fund. Pursuant to Rule 4081.5 a horse born during the year 1985 would qualify as New York bred if the horse had been conceived by a mare or dam in New York State, sired by a stallion registered as a New York stallion at the time of conception and the dam had fulfilled certain specific New York State residency requirements. A horse would also qualify if it had been conceived outside New York State and not sired by a stallion registered as a New York stallion, if the foal was delivered in New York State and the dam remained in New York, a specific length of time, as set forth in the rules.

Petitioner, a New York State licensed trainer, was charged with fraud for allegedly seeking to register four foals under the

program, born of dams, who had allegedly been returned to Virginia, instead of remaining in New York State the required length of time.

Petitioner was charged with attempting to file a false document and a hearing was ordered on the charge. During the testimony of William Welch, the administrator of the Fund, it developed for the first time that the hearing officer, James Dailey, was the draftsman of the rules under which petitioner was being prosecuted. Defense counsel promptly moved to recuse Officer Dailey, who declined to disqualify himself.

Barbara Devine, the Fund's registrar, testified that she explained to petitioner the residency requirement for the four foals to qualify under the program. Dr. Harry Hemhill, a veterinarian, testified that he owns a breeding farm and identified a letter he had sent to the Board, affirming that the mares had been on his breeding farm, the requisite period of time, although he had no personal knowledge whether this was so. His former secretary-bookkeeper testified that she typed the letter, which petitioner helped draft. What is significant is that neither Hemhill nor his former secretary testified that the horses were not on the farm during the period represented in the letter.

Petitioner was called by the Board as a witness, and availed himself of his privilege against self-incrimination. The board then read into evidence a prior statement given by him to a Board investigator, admitting that the horses had not been in New York sufficient time to qualify, but he believed they were qualified at the time he made the application.

The crucial evidence against petitioner came, over strenuous objection, from a deposition of Edward Stevens, that the mares and foals were shipped to Rocket Mills Farm in August, 1985, which would disqualify them from registration under the New York program. Of course, since a deposition of

Edward Stevens had been read into evidence, petitioner had no opportunity for cross-examination and therefore, his license has been revoked, without opportunity to confront and cross-examine, his principal accuser.

At the hearing, petitioner availed himself of his Fifth Amendment rights, when called as a witness for the Board against himself; counsel objected to the use of the deposition of Edward Stevens, on Sixth Amendment grounds and counsel moved to recuse the hearing officer, who had drafted the rules under which this prosecution was taken. These issues were raised in the petition for review in the Appellate Division, Second Department and on leave to appeal the adverse Appellate Division decision to the New York Court of Appeals. Therefore, there are no adequate state grounds for avoiding the Constitutional issues.

REASONS FOR GRANTING CERTIORARI

In *In re Ruffalo,* 390 U.S. 544 (1968), this Court held that in quasi-criminal cases, the plethora of rights available for a defendant in a criminal case, should also be available for a respondent in an administrative proceeding, where his right to earn a livelihood is at stake. Therefore, it would appear that the determination of the administrative agency, that it considered that petitioner had availed himself of his Fifth Amendment rights, in making the determination against him, was an infringement upon his Fifth Amendment rights, by reason of imposition of a penalty upon him for invoking the privilege. Certainly, this issue calls for review by the Supreme Court.

Next, the use of the deposition of Stevens against petitioner at the hearing, deprived him of his Sixth Amendment right to confrontation and cross-examination. The most fundamental rights at an administrative proceeding is the right to be present, to be represented and to have opportunity for cross-

examination. *Freight Consolidators Co-Op, Inc. v. United States,* 230 F.Supp. 692 (1964). The only witness who could definitely put these horses outside the state during the required period of times was allegedly Stevens and yet, this was the witness that petitioner had no opportunity to confront. Indeed, the fact that he participated in the drafting of the letter attesting to the presence of the horses in New York did not mean that the letter was false. Only Stevens allegedly put the horses out of the State and only Stevens was not available for cross-examination.

It has been held that a judicial officer must be neutral and detached, which means that he may be the person, who fixes administrative policy by drafting the regulations used to prosecute the respondent. *Holmes by Holmes v. Sobol,* 690 F. Supp. 154 (W.D.N.Y., 1988). In the case at bar counsel moved to recuse the hearing officer, upon learning that he was the draftsman of the regulations, which motion was denied. It would appear that a judicial officer cannot be detached, where his own legislation is the subject of a quasi-criminal prosecution.

CONCLUSION

CERTIORARI SHOULD BE GRANTED

Respectfully submitted,

JOSEPH A. FARALDO
Attorney for Petitioner
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(718) 544-6800

APPENDIX A—ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK WITH NOTICE OF ENTRY

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of April A.D. 1990

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-10 Mo. No. 201

In the Matter of Robert DeBonis,

Appellant,

v.

Richard Corbisiero, as Chairman &c., et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

NOTICE OF ENTRY

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of ROBERT DeBONIS,
Appellant,

-against-

RICHARD CORBISIERO, as Chairman
etc., et al.,
Respondents.

Index No. 10275/88
Mo. No. 201

PLEASE TAKE NOTICE that the within is a true copy of an order duly filed in the office of the Clerk of the within named court on April 26, 1990.

Dated: New York, New York
May 2, 1990

Yours, etc.,
ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 341-2579

TO:
ALAN D. LEVINE, ESQ.
489 Fifth Avenue
New York, New York 10017

GARY SAZER, ESQ.
Meltzer, Lippe,
Goldstein & Wolf
The Chancery
190 Willis Avenue
Mineola, New York 11501

CLERK
Supreme Court of the
State of New York
County of New York
60 Centre Street
New York, New York 10007

APPENDIX B—ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT WITH NOTICE OF ENTRY

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 16, 1989

Present—Hon. Francis T. Murphy, Presiding Justice
Theodore R. Kupferman
Bentley Kassal
Richard W. Wallach
George Bundy Smith, Justices.

In the Matter of the Application of
Robert DeBonis,

Petitioner,

For an Order Pursuant to Article 78 of the CPLR,

-against-

Richard Corbisiero, as Chairman and Joseph Neglia, as a Member of the New York State Racing & Wagering Board, Division of Thoroughbred Racing, and the New York State Racing & Wagering Board,

Respondents.

37732

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondents dated May 18, 1988,

And this proceeding having been transferred by order of said court, entered on June 28, 1988 (David Edwards, Jr., J.), to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Alan D. Levine of counsel for the petitioner, and by Judith E. Kaufman of counsel for the respondents; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the determination of the respondents be and the same hereby is confirmed, and the petition dismissed, without costs and without disbursements. The clerk is directed to enter judgment in favor of respondents dismissing the petition.

ENTER:
FRANCIS X. GALDI
Clerk.

NOTICE OF ENTRY

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter of the Application of
ROBERT DeBONIS,

Petitioner,

For an Order Pursuant to Article 78 of
the Civil Practice Law and Rules,

-against-

RICHARD CORBISIERO, as Chairman, and JOSEPH NEGLIA, as a Member of the NEW YORK STATE RACING & WAGERING BOARD, Division of Thoroughbred Racing and the NEW YORK STATE RACING & WAGERING BOARD,

Respondents.

Index No. 10278/88
37732

PLEASE TAKE NOTICE that the within is a true copy of an order duly filed in the office of the Clerk of the within named court on November 16, 1989.

Dated: New York, New York
December 5, 1989

Yours, etc.,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 341-2563

TO:
ALAN D. LEVINE, ESQ.
489 Fifth Avenue
New York, New York 10017

CLERK
Supreme Court of the
State of New York
County of New York
60 Centre Street
New York, New York

APPENDIX C—DECISION OF THE APPELLATE DIVISION, FIRST DEPARTMENT

APPELLATE DIVISION, SUPREME COURT
FIRST DEPARTMENT

NOVEMBER 16, 1989

The Court announces the following decisions:

Murphy, P.J., Kupferman, Kassal, Wallach, Smith, JJ.

37732

In re Application of Robert DeBonis,

Petitioner,
A.D. Levine

For an Order, etc.

-against-

Richard Corbisiero, etc., et al.,

Respondents.
J.E. Kaufman

In this proceeding, pursuant to CPLR Article 78, transferred to this Court by order of the Supreme Court, New York County (David Edwards, Jr., J.), entered on June 28, 1988, to review a determination of respondents dated may 18, 1988, which revoked petitioner's licenses as an owner and trainer of thoroughbred racing horses, the determination is unanimously confirmed and the petition dismissed, without costs.

Respondents found that in 1987 petitioner attempted to commit a fraud in connection with racing and breeding by falsely attempting to qualify four foals as "New York bred" and by causing false information to be filed with the

New York State Thoroughbred Breeding and Development Fund ("Fund"), in violation of New York State Racing, Pari-Mutual Wagering and Breeding Law ("RPMWL") §213(2), and Board Rules 9 NYCRR 4002.9(a) and 4081.5.

The principal question raised by petitioner on appeal is whether under the facts herein, it was proper for respondents to draw a negative inference from the exercise of his right under the Fifth Amendment of the United States Constitution not to testify against himself as the administrative hearing.

It is axiomatic that the Fifth Amendment privilege against self-incrimination applies to civil and criminal proceedings alike. *McCarthy v. Arndstein,* 262 US 355 (1923), decision adhered to 266 US 34 (1924). This Court noted in *Matter of LaChance v. New York State Racing and Wagering Board,* 118 AD2d 262, 267 (1st Dept., 1986), that "an individual's Fifth Amendment right may be asserted in any proceeding, whether criminal or civil administrative or judicial, investigatory or adjudicatory. (citation omitted). The fact that a licensee may have a duty to testify before the Board does not mean that his constitutional rights are thereby abridged." However, unlike criminal proceedings, a party's invocation of the Fifth Amendment in a civil or administrative proceeding may form the basis of an adverse factual inference. *Baxter v. Palmigiano,* 425 US 308, 316-317 (1976).

In *Baxter v. Palmigiano, supra,* a prison inmate challenged a prison disciplinary procedure which provided him with the right to remain silent but which also provided that his silence would create an inference of guilt. The Court stated:

> . . . the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings . . ." (at p. 316, quoting *Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973)).
>
> . . . the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by *a party to a civil cause.*" (citation omitted) (at p. 318) (emphasis in original)

Imposition of a civil sanction may not be based solely upon petitioner's assertion of the Fifth Amendment. *Lefkowitz v. Cunningham,* 431 US 801, 805 (1977). Silence may only be one of a number of factors which the finder of fact considers in making its determination. *See Lefkowitz v. Cunningham, supra,* at 808 n. 5; *see also LaChance v. New York State Racing and Wagering Board,* 118 AD2d 262, 268 (1st Dept., 1986). Here, petitioner's refusal to testify did not lead automatically to an adverse determination. Rather, it was one of several factors considered by the Board which determined by substantial evidence that petitioner had attempted to commit a fraud in connection with breeding and racing.

As petitioner invoked his Fifth Amendment right and was therefore unavailable as a witness, his former testimony, an interview given under oath to the counsel to the respondent Board, was admissible. CPLR 4517; *Fleury v. Edwards,* 14 NY2d 334, 338-339 (1964). Similarly the prior sworn testimony of the witness Edward Stevens, although hearsay, was relevant and probative and therefore properly considered. *People ex rel Vega v. Smith,* 66 NY2d 130, 139 (1985).

The evidence adduced at the hearing established that DeBonis, who managed racing and breeding affairs for the owners of the four relevant horses, caused all four mares to be brought to the Big E Farm in New York in order to deliver their 1985 foals and then had the mares "bred back" (reimpregnated) by a registered New York stallion in an effort to qualify the four 1985 foals as "New York bred." The hearing evidence further establishes that petitioner failed the final requisite for qualifying the foals—that the dams then be permanently quartered in New York from August 16, 1985 until they delivered again the following year and if not pregnant until December 31, 1985. DeBonis nevertheless represented that he had met this requirement by causing false statements to the Fund to be issued by a veterinarian, Dr. Hempfill and by his brood mare manager, Edward Stevens.

Petitioner has failed to adduce any specific facts indicating bias or prejudice by the hearing officer. *Warder v. Board of Regents,* 53 NY2d 186 (1981), *cert den* 454 US 1125 (1981).

It cannot be said that the penalty of revocation is "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *Matter of Pell v. Board of Education,* 34 NY2d 222, 233 (1974).

Order filed.

APPENDIX D—FINDINGS AND ORDER OF THE NEW YORK STATE RACING AND WAGERING BOARD, DIVISION OF THOROUGHBRED RACING

IN THE MATTER OF
ROBERT DEBONIS

The Respondent, having been served with an Order to Show cause dated September 24, 1987 requiring him to show cause why his license to participate in pari-mutuel thoroughbred racing should not be suspendd or revoked pursuant to Section 213 of the Racing, Pari-Mutuel Wagering and Breeding Law and Board rules 9 NYCRR 4002.9(a), 4081.5, 4081.10, 4081.11, and a hearing having been held in this matter on November 17, 1987, December 15, 1987, March 10, 1988, March 24, 1988 and March 28, 1988, at which testimony was adduced and evidence was received, and the Hearing Officer having rendered a report which is annexed hereto and incorporated herein, and after due deliberation, the Board finds as follows:

1. Robert DeBonis was licensed by the Board as a thoroughbred trainer for a number of years including 1987.

2. In or about May 1987, Robert DeBonis filed applications to register the 1985 foals of "SNOWHERE", "ADDY'S VENTURE", "DEVASTATING", and "STAR BAIT" as New York breds.

3. These foals were unqualified to be registered as New York breds.

4. Robert DeBonis misrepresented the unqualified foals to be qualified and knowingly caused untrue statements to be supplied to the New York State Thoroughbred Breeding and Development Fund.

5. Robert DeBonis refused to testify in response to questions regarding the facts and circumstances relating to the charges against him and failed to testify on his own behalf in the administrative proceeding. An adverse inference is drawn against Mr. DeBonis based upon his failure to testify.

6. Robert DeBonis attempted to commit a fraud in connection with racing and breeding by attempting to qualify, as New York breds, horses he knew to be unqualified and by causing false information to be filed with the New York State Thoroughbred Breeding and Development Fund.

7. As a result of his conduct, Robert DeBonis violated Racing, Pari-Mutuel Wagering and Breeding Law Section 213(2) and Board rules 9NYCRR Sections 4002.9(a) and 4081.5.

8. The conduct of Robert DeBonis indicates that he lacks the character and general fitness required of a licensee and that his continued participation in pari-mutuel racing will be inconsistent with the public interest, convenience and necessity and with the best interests of racing generally.

Therefore, upon the record, the report of the Hearing Officer and the findings herein, it is hereby

ORDERED that the thoroughbred racing license of Robert DeBonis be revoked effective May 21, 1988.

FOR THE NEW YORK STATE RACING AND WAGERING BOARD

s/ Thomas C. Davide
THOMAS C. DAVIDE
SECRETARY TO THE BOARD

DATED: NEW YORK, NEW YORK
MAY 18, 1988

APPENDIX E—REPORT OF HEARING OFFICER

NEW YORK STATE RACING AND WAGERING BOARD
DIVISION OF THOROUGHBRED RACING

In the Matter
of
the license of Robert DeBonis to participate in Thoroughbred Racing

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This was a proceeding for the suspension or revocation of the license of Robert DeBonis to participate in thoroughbred racing for lack of the requisite experience, character or general fitness, for committing or attempting to commit a fraud or misrepresentation in connection with racing or breeding, for violating a Board rule by filing false information with the New York State Thoroughbred Breeding and Development Fund and for failing to cooperate in an inquiry conducted by the Board. The matter was initiated by order to show cause by the Board on September 24, 1987. The hearing thereon was conducted by the undersigned, as hearing officer, on November 17, 1987, December 15, 1987, March 10, 1988, March 24, 1988 and March 28, 1988. DeBonis was represented by Joseph Faraldo, Esq.; the Board by its Counsel, David Vaughan, Esq.

The matter concerns the conduct of DeBonis in attempting to register four foals of 1985 as New York bred thoroughbreds with the New York State Thoroughbred Breeding and Development Fund in 1987.

From the evidence at the hearing it appeared that DeBonis who manages the racing and breeding affairs of the owners (one of whom is his wife) of the four relevant

"dams" (mothers), caused the four mares to be brought to New York to "drop" (deliver) their 1985 foals, and then had the mares "bred back" (serviced) by a registered New York stallion in an attempt to qualify the four 1985 offspring as "New York breds." Problems arose concerning a final requisite for their qualification, i.e. that the dams then be permanently quartered in New York from August 16, 1985 until they "foaled" (delivered) the following year, or, if not "in foal" (pregnant), through December 31, 1985. It is alleged that although this final criterion was not met (through whose fault is not clear) that DeBonis nevertheless represented that it had been met and caused false certificates as evidence thereof to be issued by a veterinarian, Dr. Harry Hemphill, and by DeBonis' out-of-state farm manager, Edward Stevens. Finally, it is alleged, that DeBonis, under subpoena by the Board, did not furnish all relevant information and records concerning such matter.

The State Legislature has created and fostered a program to encourage the breeding of thoroughbred horses in New York in Article II, Sections 244-249 of the Racing, Pari-Mutul Wagering and Breeding Law. Through this program, the owners and breeders of thoroughbred horses are given substantial financial incentives to produce "New York bred" horses. The New York State Thoroughbred Breeding and Development Fund, a public benefit corporation is the statutory vehicle established to administer the program.

Pursuant to rules of that Fund there were several different ways in which a foal of 1985 could qualify as a "New York bred." For foals such as those here at issue, which were conceived outside the state and dropped in the state from dams brought into the state just before the foals' birth, the additional requirements (to being dropped

to New York) were that the dams thereof be bred back to registered New York Sires in 1985 *and* that those dams be permanently quartered in New York from August 16, 1985 until they foaled again in 1986 (unless a mare failed to conceive in 1985, in which case it must have been quartered in New York from August 16, 1975 through December 31, 1985).

William Welch, executive administrator of the state Breeding Fund, testified that he had managed the Fund since it was created fourteen years ago. He set forth the objectives as benefits of the program and the criteria used in establishing eligibility. Welch produced from the Fund's files the applications of DeBonis to register as New York breds the 1985 foals *Snowhere, Addy's Venture, Devastating* and *Star Bait,* with accompanying documents (letter of Hemphill Farms, Ltd., dated May 5, 1987 [Exhibit 9] and letter of Rocketts Mill Farm, dated June 1987 [Exhibit 10].

Barbara Devine, the Fund's "registrar" testified that she had had a number of phone conversations with DeBonis regarding the registration of these foals both before the applications were received on May 21, 1987 and thereafter. She testified that on the initial call, on March 18, 1987, that she and DeBonis discussed the four applications (which he presumably had in front of him) in detail; that DeBonis informed her that he was using "B1" eligibility (i.e., that the mares were in New York from August 16, 1984 until the foals dropped in 1985) and that she told him that in addition to his own signature (which he said was all he had at that point) that he must have the signature of the farm manager or veterinarian for the farm where the foals were dropped as called for by the form.

Devine testified that DeBonis called again in April, 1987 and it having been ascertained that the mares had not been in New York from August 1984, and that Dr. Andreason (for Big E Farm) would not certify that they had been at Big E for the requisite subsequent period (i.e., August 16, 1985 et seq.), that DeBonis was advised he wouldneed proof from the farm where the mares had in fact been housed during the latter period. DeBonis stated, according to Devine, that while he hadn't known in 1985 that the mares had been required to stay in New York after their breeding in 1985, actually the mares had so stayed in New York, at Hemphill's farm, and DeBonis said he would secure proof thereof.

Devine testified that thereafter she received a letter from the Schoenborn Brothers farm (a New York farm) stating that the DeBonis mares had arrived there in March, 1986 (for breeding in 1986), then a letter from Hemphill Farms, Ltd. [Exhibit 9] stating that the mares had been at that farm from August 23, 1985 until *April* 2, 1986, and finally the four DeBonis applications (on May 21, 1987). Thereafter, in June, DeBonis called again, Devine further testified, and stated again that the mare had been in New York since 1985. In fact according to Devine, he stated that they had never left the state since 1985.

Thereafter, a letter dated June 16, 1987, from Rockettsmill Farm was received by the Fund, supporting the essential part of this representation.

Dr. Harry Hemphill, D.V.M., was called by the Board and testified at some length before finally refusing to answer further questions from the Board's counsel. When asked about a prior statement to this Board regarding the circumstances surrounding the preparation and signing of his letter to the Fund [Exhibit 9], counsel to

DeBonis interrupted to put on the record that he (counsel) had formerly represented Hemphill and was requesting the hearing officer to advise Hemphill of his 5th Amendment rights and also of his rights not to answer under *Barchi v. Barry*(?) and *LaChance v. Tuffariello*(?). From this point on Hemphill refused to testify further.

To that point, Hemphill had testified that not only did he not know whether the horses named in his letter [Exhibit 9] had been to his farm, as stated, but that he didn't even inquire into the accuracy of the facts and had signed the letter without really knowing whether it was true or what its purpose was.

Jamie Jones-Moskin testified that she had formerly worked for Hemphill and had prepared Exhibit 9 for his signature on the day it was dated. She testified that Hemphill had given her a piece of paper and had instructed her to use the paper to type a letter to the "Breeders Fund." When she told Hemphill that she couldn't read the writing on the piece of paper (it wasn't Hemphill's writing), Hemphill told her to call DeBonis' barn. She did and spoke to DeBonis and the two of them made out the wording of the paper over the phone, DeBonis filling in the words she couldn't read (specifically, the dates) between the words she could read. She thereupon completed typing the letter and left it, unsigned, on Hemphill's desk.

The Board then called DeBonis. DeBonis' counsel objected, stating that he was advising DeBonis not to testify on 5th Amendment grounds and that DeBonis was further advised to testify only if called by his own counsel, citing *Tuffariello v. Barry*. DeBonis did, in fact, refuse to answer any questions and was excused, after he was nevertheless called and put under oath.

(In an interview by the Board on September 1, 1987 [Exhibit 11], DeBonis stated that the mares in question had been shipped from Rocketts Mill Farm (Virginia) in 1985 to Big E Farm in New York State [Exhibit 11, page 38], dropped their foals and were bred back at "Big E" [Exhibit 11, page 48], and then the four mares and their foals had left the Big E Farm in 1985 and returned to Rocketts Mill Farm [Exhibit 11, page 50] from whence they were shipped again, in 1986, to Schoenborn Farm in ***.